Dura-Vent Corporation *and* Sheet Metal Workers International Association, Local Union No. 355 of Northern California, AFL-CIO. Case 20-CA-15339

July 30, 1981

DECISION AND ORDER

On May 4, 1981, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding.[1] Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs. Subsequently, the General Counsel filed an answering brief in opposition to the exceptions filed by Respondent.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Dura-Vent Corporation, Redwood City, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] On May 5, 1981, the Administrative Law Judge issued an erratum to his Decision.

[2] Respondent has excepted, *inter alia*, to the Administrative Law Judge's recommendation that it be ordered to bargain with the Charging Party, submitting that such an order is improper because a question concerning representation has been raised in Case 20-RC-15184. We find no merit in Respondent's exception. The Board authorized the Regional Director to process Case 20-RC-15184 to a conclusion in the face of the outstanding complaint in the instant case because it concluded that a fair election could still be conducted. See NLRB Casehandling Manual (Part Two) Representation Proceedings, sec. 11730.5. Further, we note that the Administrative Law Judge's recommended Order is narrowly drawn. Rather than requiring Respondent to bargain generally with the Charging Party, it merely requires Respondent to engage in limited bargaining to remedy the precise unfair labor practice found. See par. 2(a) of the Administrative Law Judge's recommended Order. Under the circumstances herein, we conclude that such a remedial order is appropriate.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This matter was heard before me on March 10, 1981, at San Francisco, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 20 of the National Labor Relations Board on June 27, 1980, based on a charge filed on May 8, 1980, by Sheet Metal Workers International Association, Local Union No. 355 of Northern California, AFL-CIO (the Charging Party or the Union) against Dura-Vent Corporation (Respondent).

The complaint, as amended orally at the hearing, alleges that Respondent eliminated an employee classification from a unit represented by the Charging Party without offering the Charging Party an opportunity to meet and bargain regarding the elimination in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act). It further alleges that Respondent accomplished this change by offering employees in the classification increased wages and benefits if they accepted promotions out of the unit, by threatening demotions if they refused, and by granting increases to those employees who accepted the new position, in violation of Section 8(a)(1) of the Act. Respondent denies it has violated the Act.

All parties were given full opportunity to participate at the hearing,[1] to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file post-hearing briefs.

Upon the entire record herein, including post-hearing briefs submitted by the General Counsel, Respondent, and the Charging Party, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent is a California corporation with a place of business in Redwood City, California, where it is engaged in the manufacture and sale of metal products. In the course of its business operations Respondent annually enjoys a gross dollar volume of business in excess of $500,000 and sells and ships products of a value in excess of $50,000 directly from its Redwood City facility to points outside the State of California.

II. LABOR ORGANIZATION

The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

[1] At the commencement of the hearing a representative of United Electrical, Radio and Machine Workers of America, moved for permission to make a sound recording of the proceeding. The motion was denied.

Immediately thereafter a representative of KPIX, Channel 5, a local television station, moved for permission to film portions of the proceeding. The General Counsel and the Charging Party opposed the motion. I denied the motion based on the Board's traditional position opposing filming in the courtroom. See, for example, the National Labor Relations Board Administrative Law Judge's manual, par. 17118.1. I judicially notice that recent statutory and decisional law increasingly admits of media access to courtrooms. In my view, however, if the Board's position regarding such activities is to be changed it should be done by the Board and not by an administrative law judge.

[2] There was essentially no dispute concerning relevant facts. Unless otherwise noted these findings are based on the pleadings, stipulations, admissions, unchallenged documents of the parties, and uncontested testimony of credible witnesses.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Events*

1. Background

Since 1965, the Charging Party has represented employees of Respondent in the following unit:

> All sheet metal production workers and trainees, including local pick-up and delivery truck drivers; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

The unit is an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act. The parties have negotiated a series of collective-bargaining agreements, including one effective by its terms from December 1, 1977, through January 15, 1981. That contract set wage and benefit rates for various classifications of employees within the unit. Included in the contract and in the unit are the classifcations "leadman" and "working foreman."

2. Respondent decides to change its employee classification[3]

In or about April 1980 Respondent's labor relations consultant advised Respondent that it should consider taking certain actions to make the Employer's operations better able to resist a possible strike by unit employees. It was determined that Respondent could better function during a strike by eliminating the working foreman classification and creating a new class of supervisors who would be explicitly excluded from the unit and aligned with management rather than the Union in any dispute.

3. The management-employee meeting and subsequent changes[4]

On or about May 1, 1980,[5] Respondent's agents met with the employees who were employed in the classification working foreman.[6] The employees were told by Respondent's agents that they were being offered new jobs classified "supervisor" with attendant wage increases of $1 per hour and certain fringe benefit increases. The increases were to be coupled with concomitant removal from inclusion within the unit, exclusion from coverage under the collective-bargaining agreement, and loss of union membership. Those who did not accept the promotions were to be demoted to a lower unit classification paying 50 cents per hour less.

A second meeting was held with the employees a few days later at which time most elected to accept the supervisor positions. In some cases additional individual conversations were held between agents of Respondent and employees before the position was accepted. In any case all the employees soon accepted the new positions and received the promised increases effective on or about May 5.[7] The employees were required to sign a letter dated May 1, on Respondent's stationery, addressed to the Charging Party which stated:

> The following people have accepted supervisory positions at Dura-Vent and will no longer be Union members. They are requesting withdrawal cards and a refund of any dues which they had paid ahead.

The letter was thereafter sent to the Union.

The employees had been union members and had signed union checkoff forms provided for them under the contract,[8] whereby the Employer deducted from employee wages and remitted to the Union periodic dues payments. Upon the promotion of the employees in question, Respondent stopped remission of their dues to the Union.

4. The supervisory status of the employees

The pleadings establish that no employees in the unit are statutory supervisors and further that the contractual classifications, including working foreman, are unit positions. Thus, technically the pleadings have met the General Counsel's burden of showing that the employees classified as working foremen were employees rather than statutory supervisors prior to their promotion and change in job titles. Further, the record contains credible testimony from Monterrubio, Del Rio, and Ramon Ornelas that, as working foremen, they did not have the au-

---

[3] The advice to initiate a change in the unit and Respondent's actions thereon were not disputed by Respondent. These findings are based on the correspondence between the parties and on the credible and undenied testimony of Michael Eisenscher that he heard Ray Vetterlein, Respondent's admitted agent and labor relations consultant, explain his advice to Respondent and Respondent's motive for making the changes described. Such testimony is not hearsay and may therefore be received for the truth of the matter. See Fed. R. Evid. 801(d)(2).

[4] The General Counsel adduced credible testimony concerning this meeting from Del Rio, Corvello, and Florez. With the sole exception of the identity of one of several admitted agents of Respondent attending the meeting, Respondent did not dispute the testimony of the witnesses. The parties further stipulated that 11 other employees at the meeting would have testified consistently with the above-named employees. What follows is a cursory composite of the undisputed events augmented by stipulations of the parties concerning subsequent wage changes.

[5] All dates are 1980 unless otherwise indicated.

[6] These employees were:

Jose Alvarez	Cesar Lopez
Miguel Arreola	Felix Medina
Salvador Chacon	Carlos Monterrubio
Mariano Chavez	Louis V. Nunez
Uriel Chavez	Ramon Ornelas
Antonio Del Rio	Tony Ornelas
Alfonso Gonzalez	Arturo Valencia

Monterrubio at the time was classified as a leadman apparently through a clerical error. When he subsequently pointed out his leadman status to management, he was immediately promoted to working foreman. For all relevant purposes he may be treated as similiarly situated with the working foreman.

[7] All the employees involved received $1-per-hour increases save for Mariano Chavez and Tony Ornelas, who received increases of $1.50 per hour, and Arturo Valencia, who received an increase of $1.25 per hour. Antonio Del Rio did not initially accept the position and received an initial wage decrease of 50 cents per hour. Soon thereafter he suffered a medically caused employment hiatus. Upon his return to the job he accepted the promotion and received the promised increase.

[8] While the contract contains a union-security clause, its effect was superseded in February 1980 as the result of a union-security clause decertification election.

thority to hire, fire, or effectively recommend the hire or fire of employees. Nor did they grant employees vacation or sick leave or participate in the handling of employee grievances. While there was evidence that the employees had a role in the general direction and training of the employees and in maintaining product quality control, this evidence is clearly insufficient to support a finding that the working foremen were supervisors within the meaning of Section 2(11) of the Act.

As "supervisors" following their promotion the employees spent a substantial part of their time engaged in unit work.[9] While the General Counsel took the position that the employees acting in the newly created classification exercised or were authorized to exercise the authorities described in Section 2(11) of the Act, the record is not clear on the issue.[10] In view of my determination, *infra*, it is unnecessary to make any findings concerning the supervisory status of the employees after their promotion.

5. Contacts between Respondent and the Union

The Union received the list of employees who wished to withdraw from the Union on or about May 3 or 4. This was the first notice received by the Union regarding the events in question.

The Union's business manager thereafter spoke by telephone with Respondent's agents and informed them they could not "arbitrarily transfer the people out of the bargaining unit." On May 13 Ray Vetterlein wrote the Union and described in some detail the changes made. In his letter he noted the Union's earlier expressions of protest regarding the changes. He offered to meet with the Union but did not offer to reconsider the changes. His letter noted in part:

> It is really up to you. I'm hardly going to get into a dispute with you at this point as by the time we got the matter to arbitration the contract would expire anyway so anything we did in a formal proceeding would be fairly academic.

The Union thereafter pursued its case through the Board while Respondent sought to handle any differences under the contract grievance procedures.

B. *Analysis and Conclusion*[11]

Respondent threatened employees with wage reductions unless they accepted different positions which required them to abandon their position within the unit, their union membership, and the rights of employees generally under the Act. They were to become agents of management. Such conduct by Respondent required employees to forgo their existing rights or suffer a monetary penalty. In so doing Respondent violated Section 8(a)(1) of the Act.

Respondent also offered to promote and did promote those employees employed as working foremen to positions outside the unit, thereby eliminating the classification of working foreman and assigning unit work to employees not covered by the collective-bargaining agreement. Respondent undertook these actions without providing the Union with notice of or an opportunity to bargain regarding the changes. Confronted with the *fait accompli*, the Union was thereafter denied an opportunity to bargain effectively over the changes. Respondent's willingness to handle the matter under the contract grievance language is not the legal equivalent of an offer to bargain.

No dispute exists that an employer may promote individuals in the unit to supervisory position outside the unit. The General Counsel's cited case, *Kendall College*, 228 NLRB 1083 (1977), and cases cited therein stand for the proposition that the removal of employees in a classification in the bargaining unit by means of the investiture of supervisory status creates a duty to bargain concerning the action if a significant amount of unit work is involved. Thus, if the newly created classification carries with it supervisory responsibilities which have an impact on the unit, then Respondent violates the Act if it unilaterally implemented such changes. There is no doubt that a significant amount of unit work is involved herein. I have not found that the new allegedly supervisory positions were supervisory within the meaning of Section 2(11) of the Act on this record. Were the employees in the supervisory position not statutory supervisors, however, a violation would still occur and the remedy would be no less. This is so because when employees are unilaterally removed from the unit—whether they remain employees or are transmuted into statutory supervisors—the Union is denied its opportunity to bargin over changes having a significant impact on the unit it represents. Thus, I find a violation of Section 8(a)(5) of the Act as alleged, without determining the statutory supervisory status of the employees after receiving the title "supervisor" in May.

Upon the foregoing findings of fact and the entire record herein, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been and is now the exclusive bargaining representative of Re-

[9] There is also no doubt and I find that the amount of unit work done by the promoted employees was significant. The transfer of this work had a substantial impact on the unit.

[10] Respondent in creating the position clearly informed the promoted employees that they were authorized to exercise supervisory authority. There is little evidence that the employees in actuality assumed such authority.

[11] At the commencement of the hearing Respondent moved that this case be deferred to the arbitration process contained in the contract. I denied that motion and reaffirm that ruling here. The issues in the instant case go to the scope of Respondent's recognition of the Union, the statutory rights of the employees involved, and the legal rights of Respondent to undertake the actions it did. These matters are within the special competence of the Board rather than an arbitrator. See, e.g., *The Anaconda Company*, 224 NLRB 1041 (1976), enfd. 578 F.2d 1385 (9th Cir. 1978); *Marion Power Shovel Company, Inc.*, 230 NLRB 576 (1977); *General American Transportation Corporation*, 228 NLRB 808 (1977).

spondent's employees in the following unit which is appropriate within the meaning of Section 9(b) of the Act:

> All sheet metal production workers and trainees, including local pick-up and delivery truck drivers; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

4. On or about May 1, 1980, by threatening the employees listed in footnote 6 of this Decision with demotions and wage reductions unless they accepted positions outside the bargaining unit described above, Respondent violated Section 8(a)(1) of the Act.

5. Respondent, by undertaking the following changes in employee working conditions in May 1980 without prior notice to or without affording the Union an opportunity to meet and bargain with respect to the action and its effects, has violated Section 8(a)(5) and (1) of the Act:

(a) By offering to promote and promoting the employees listed in footnote 6 of this Decision to positions outside the bargaining unit.

(b) By granting increases in said employees' wages and benefits.

(c) By eliminating the unit classification "working foreman."

(d) By assigning bargaining unit work to individuals not covered by the collective-bargaining agreement.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in violations of Section 8(a)(5) and (1) of the Act, I shall order it to cease and desist therefrom and to take certain affirmative actions to remedy the unfair labor practices and to effectuate the purposes of the Act.[12]

As I have found that Respondent has failed to meet and bargain with the Union concerning the terms and conditions of employment of the employees formerly classified as working foremen, I shall affirmatively order Respondent to do so. As the Board ordered in *Kendall College, supra*, and for the reasons cited therein, I shall order Respondent to restore the *status quo ante* regarding the shift of employees outside the bargaining unit, conditioned upon the affirmative desire of the employees as expressed through their bargaining agent.

A normal remedy for employee losses in wages and benefits through unilateral changes is a make-whole order. The Board does not require that employees forgo increases in wages and benefits. Where it is impossible to determine if the unilateral changes in their entirety have been detrimental or beneficial, the Board issues a restoration order conditioned upon the affirmative desires of the affected employees as expressed through their bargaining agent. *Kendall College, supra; Herman Sausage Co., Inc.*, 122 NLRB 168 (1958). I shall do so here.

If the bargaining representative elects such a restoration of benefits, a general order requiring Respondent to make all omitted payments required under the contract had it been applied to the employees after their promotion here is sufficient. Any specific determination of amounts and the identity of recipients of the payments will be deferred to the compliance stage of these proceedings if it becomes necessary. *J. F. Swick Insulation Co., Inc.*, 247 NLRB 626 (1980).

The Union requested that it be reimbursed for the loss of dues payments it would have received from the employees who signed the employer-prepared checkoff cancellation and membership resignation letter.[13] While not separately alleged as a violation of Section 8(a)(5) and (1), Respondent's wrongful actions clearly included its repudiation of the checkoff provision. It was responsible for the employees' withdrawal of their previous checkoff requests and their loss of union membership. There is unchallenged evidence that the promoted employees had had their union dues remitted by checkoff up until the time of the signing and sending of the withdrawal letter and further evidence that no dues were received by the Union thereafter. Under these circumstances, the Board requires that the Union be made whole for its loss. *J. F. Swick Insulation Co., Inc., supra*; *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970).

If the Union elects to have previous conditions restored, calculations of the sums and payments necessary to make employees whole shall be calculated in accordance with normal Board policy. See *F. W. Woolworth Company*, 90 NLRB 289 (1950). In that event, however, dues payments to the Union may be offset against such payments in the manner set forth in *Ogle Protection Service, Inc., supra.*

Appropriate interest on any amounts due shall be calculated and paid in accordance with the Board's policies set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and the entire record, I hereby issue the following recommended:

ORDER[14]

The Respondent, Dura-Vent Corporation, Redwood City, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with demotions and wage reductions unless they accept positions outside the bargaining unit.

(b) Taking the following action unilaterally without giving the Union notice and an opportunity to bargain:

[12] The parties agreed that any remedial notice to employees should appear in both Spanish and English language versions.

[13] Respondent opposed the Union's requested remedy. The General Counsel did not join or oppose this request, even though the General Counsel had prior notice of the Union's request. The Union requested this remedy at the hearing and again in its brief (which was filed significantly earlier than were those of the other parties). On brief the General Counsel sought "all appropriate relief" without greater specificity.

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(1) Offering to promote and promoting unit employees to positions outside the bargaining unit.

(2) Granting increases in employee wages and changing employee benefits.

(3) Eliminating the bargaining unit job classification "working foreman."

(4) Assigning bargaining unit work to individuals not covered by the collective-bargaining agreement.

(c) Requiring employees to withdraw from the Union, canceling employee dues-checkoff agreements, and failing and refusing to withhold and remit to the Union dues moneys consistent with valid employee authorized checkoff forms authorized under a valid collective-bargaining agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative actions to remedy the unfair labor practices found and to effectuate the policies of the Act:

(a) Upon request meet and bargain collectively with Sheet Metal Workers International Association, Local Union No. 355 of Northern California, AFL-CIO, regarding the terms and conditions of employment of those employees formerly classified as "working foreman."

(b) If the Union so desires, revoke and cease utilizing the new employee classification "supervisor" and restore to their previous classification of "working foreman" those employees who were reclassified from "working foreman" to "supervisor."

(c) If the Union so desires, revoke and cease giving effect to the wage and benefit levels paid to the employees who were reclassified "supervisors" from "working foreman" and restore their previous wages and benefits.

(d) If the Union so desires, make employees who were reclassified "supervisors" from "working foreman" whole for any loss of wages and fringe benefits they may have suffered by virtue of their loss of contractually established wages and benefits; said make-whole requirement, with appropriate interest, shall include appropriate health, welfare, pension, and other payments on behalf of employees to be determined consistently with the portion of this Decision entitled "The Remedy."

(e) Make the Union whole for any loss of dues, with appropriate interest thereon, suffered as a result of Respondent's actions in causing employees to withdraw from the Union and in failing to comply with the checkoff provisions of the collective-bargaining agreement, as provided in the portion of this Decision entitled "The Remedy."

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records and other data necessary and appropriate to allow calculation of the payments due under the terms of this Order and to allow verification of Respondent's compliance with this Order's terms.

(g) Post at its place of business in Redwood City, California, copies of the attached notice marked "Appendix"[15] and a Spanish language equivalent thereof. Copies of said notices, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted for 60 consecutive days thereafter, in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT threaten employees with demotions and wage reductions if they do not accept positions outside the bargaining unit.

WE WILL NOT take the following actions unilaterally without giving Sheet Metal Workers International Association, Local Union No. 355 of Northern California, AFL-CIO, notice and an opportunity to bargain concerning the proposed actions and their consequences:

Offer to promote and promote unit employees to positions outside the bargaining unit.
Grant increases in employee wages and change employee benefits.
Eliminate the bargaining unit job classification "working foreman."
Assign bargaining unit work to individuals not covered by the collective-bargaining agreement.

WE WILL NOT require employees to withdraw from the Union, cancel their dues-checkoff agreements, or fail and refuse to withhold from employee wages and remit to the Union dues moneys consist-

ent with valid employee authorized checkoff provisions pursuant to a valid collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL upon request meet and bargain collectively with Sheet Metal Workers International Association, Local Union No. 355 of Northern California, AFL-CIO, regarding the terms and conditions of employment of those employees formerly classified as "working foremen."

WE WILL, if the Union so desires, revoke and cease utilizing the new employee classification "supervisors" and restore to their previous classification, "working foreman," those employees who were reclassified from "working foreman" to "supervisor."

WE WILL, if the Union so desires, revoke and cease giving effect to the wage and benefit levels paid to the employees who were reclassified "supervisors" from "working foreman."

WE WILL, if the Union so desires, make employees who were reclassified "supervisors" from "working foreman" whole for the loss of wages and fringe benefits they may have suffered by virtue of their loss of contractually established wages and benefits; said make-whole requirement shall include appropriate interest and also appropriate health, welfare, pension, and other payments on behalf of employees, with interest.

WE WILL pay to the Union any loss of dues, with appropriate interest, suffered as a result of our action in causing former "working foreman" employees to withdraw from the Union and in failing to comply with the checkoff provisions of the collective-bargaining agreement.

DURA-VENT CORPORATION